

FEDERAL COURT OF AUSTRALIA

Maharjan v Minister for Immigration and Border Protection [2017] FCAFC 213

Appeal from: *Maharjan & Ors v Minister for Immigration & Anor* [2016] FCCA 3029

File number: NSD 2127 of 2016

Judges: **GILMOUR, LOGAN AND MORTIMER JJ**

Date of judgment: 15 December 2017

Catchwords: **MIGRATION** – alleged fraud committed on a visa applicant during the visa application process – whether Federal Circuit Court failed to consider whether fraud had invalidated the visa application or the visa application process – application of *Singh v Minister for Immigration and Border Protection* [2016] FCAFC 141 and *Gill v Minister for Immigration and Border Protection* [2016] FCAFC 142 – consideration of *Trivedi v Minister for Immigration and Border Protection* (2014) 220 FCR 169 – appeal allowed

PRACTICE AND PROCEDURE – application for leave to amend notice of appeal – whether appellant should have leave to raise a new ground not run below – leave granted

Legislation: *Constitution*, s 75(v)
Migration Act 1958 (Cth), ss 45, 46, 47, 48, 54, 55, 65, 97, 98, 476
Migration Regulations 1994 (Cth), Sch 2, cl 573; Sch 4, Pt 1, item 4020

Cases cited: *Cameron v Holt* [1980] HCA 5; 142 CLR 342
Coulton v Holcombe (1986) 162 CLR 1
DPP v Moseley [2013] NTSC 8; 275 FLR 140
Gill v Minister for Immigration and Border Protection [2016] FCAFC 142
Kumra v Minister for Immigration and Border Protection [2017] FCA 778
Minister for Immigration and Border Protection v Kim [2014] FCAFC 47; 221 FCR 523
Minister for Immigration and Border Protection v Kumar [2017] HCA 11; 91 ALJR 466
Minister for Immigration and Border Protection v Singh &

Anor [2017] HCATrans 79
Minister for Immigration and Citizenship v Lu [2010] FCAFC 147; 189 FCR 525
Minister for Immigration and Citizenship v SZLIX [2008] FCAFC 17; 245 ALR 501
Minister for Immigration and Multicultural Affairs v Li [2000] FCA 1456; 103 FCR 486
Murad v Assistant Minister for Immigration and Border Protection [2017] FCAFC 73
Murphy v Farmer [1988] HCA 31; 165 CLR 19
O'Brien v Komesaroff (1982) 150 CLR 310
Park v Brothers (2005) 85 ALJR 371
Plaintiff M150/2013 v Minister for Immigration and Border Protection [2014] HCA 25; 255 CLR 199
Plaintiff S297/2013 v Minister for Immigration and Border Protection [2014] HCA 24; 255 CLR 179
Prodduturi v Minister for Immigration and Border Protection [2014] FCA 624; 142 ALD 550
Prodduturi v Minister for Immigration and Border Protection [2015] FCAFC 5; 144 ALD 243
R (Burns) v County Court Judge of Tyrone [1961] NI 167
R v Stanley [2014] QCA 116; [2015] 1 Qd R 118
Singh v Minister for Immigration [2015] FCCA 509
Singh v Minister for Immigration and Border Protection [2015] FCAFC 151
Singh v Minister for Immigration and Border Protection [2016] FCAFC 141
Singh v Minister for Immigration and Border Protection [2017] FCA 475
Sun v Minister for Immigration and Border Protection [2016] FCAFC 52; 243 FCR 220
SZFDE v Minister for Immigration and Citizenship [2007] HCA 35; 232 CLR 189
SZLHP v Minister for Immigration and Citizenship [2008] FCAFC 152; 172 FCR 170
SZRUR v Minister for Immigration and Border Protection [2013] FCAFC 146; 216 FCR 445
SZSJA v Minister for Immigration and Border Protection [2013] FCAFC 158; 308 ALR 266
SZSXT v Minister for Immigration and Border Protection [2014] FCAFC 40; 222 FCR 73
Trivedi v Minister for Immigration and Border Protection [2014] FCAFC 42; 220 FCR 169
University of Wollongong v. Metwally (No. 2) (1985) 59

ALJR 481

Vyas v Minister for Immigration and Citizenship [2012]
FMCA 92

Wati v Minister for Immigration and Ethnic Affairs [1996]
FCA 1043; 71 FCR 103

Date of hearing:	8 August 2017
Registry:	New South Wales
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	131
Counsel for the Appellants:	Mr D Godwin
Counsel for the First Respondent:	Mr T Reilly
Solicitor for the First Respondent:	DLA Piper Australia
Counsel for the Second Respondent:	The Second Respondent submits to any order the Court may make, save as to costs

ORDERS

NSD 2127 of 2016

BETWEEN: **SHRAMIKA MAHARJAN**
 First Appellant

RAJU MAHARJAN
Second Appellant

SARAD MAHARJAN
Third Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGES: **GILMOUR, LOGAN AND MORTIMER JJ**

DATE OF ORDER: **15 DECEMBER 2017**

THE COURT ORDERS THAT:

1. 1. The appellants have leave to file and rely upon the amended notice of appeal dated 8 August 2017.
2. 2. The appeal be allowed.
3. 3. The orders of the Federal Circuit Court made on 25 November 2016, including orders as to costs, be set aside.
4. 4. The matter be remitted to the Federal Circuit Court for determination according to law.
5. 5. The first respondent pay the appellants' costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GILMOUR AND MORTIMER JJ:

1 This appeal requires the Court again to consider the effects of an alleged fraud committed on a visa applicant during the visa application process. On appeal before this Court, the appellants sought to raise for the first time an argument based on the two decisions of the Full Court of this Court in *Singh v Minister for Immigration and Border Protection* [2016] FCAFC 141 and *Gill v Minister for Immigration and Border Protection* [2016] FCAFC 142. The appellants abandoned their existing grounds of appeal and sought to rely only on one ground of appeal, which they submit arose as a consequence of these decisions. The Minister opposes leave being granted to the appellants to rely on this new ground.

2 For the reasons which we set out below, we would grant the appellants leave to amend their notice of appeal to rely on a single ground derived from the Full Court's decisions in *Singh* and *Gill*, and we would allow the appeal.

BACKGROUND

3 Insofar as the facts underlying the appeal need to be considered, they are not controversial. The first appellant, Ms Maharjan, applied for a student visa on 11 March 2013. The criteria which Ms Maharjan needed to satisfy at the time of decision on her application included the criteria set out in cl 572.224(a) of Sch 2 to the *Migration Regulations 1994* (Cth). Located within that clause was a requirement that a visa applicant satisfy public interest criterion 4020 (PIC 4020), which is set out as item 4020 of Pt 1 of Sch 4 to the Regulations.

4 Relevantly, PIC 4020 provided:

- (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
 - (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made....
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or

misleading in a material particular because of information given by the applicant.

- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

- (a) compelling circumstances that affect the interests of Australia; or
- (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

- (5) In this clause:

information that is false or misleading in a material particular means information that is:

- (a) false or misleading at the time it is given; and
- (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

5 5 As we have noted, Ms Maharjan submitted her visa application on 11 March 2013. Her spouse, the second appellant, was also included in the same application form as a secondary applicant. The third appellant, the son of the first two appellants, was born in November 2013 and subsequently added to the application. The applications were submitted through a migration agent. As part of the visa application form itself, Ms Maharjan was required to answer a number of questions. One of those questions was:

Do you have access to sufficient funds to support you and your family unit members for the TOTAL period of your stay in Australia (including proposed tuition costs for you and any school aged family members, living costs and costs of fares, regardless of whether your dependants intend to accompany you to Australia)?

6 6 Ms Maharjan answered yes to this question. She was then asked to make the following declaration:

I certify that the information provided on or with this form is correct.

7 7 She answered “yes” to this declaration.

8 8 A number of documents were sent to the Department together with the appellants’ application form. These included certificates from the University of Ballarat and an academic transcript of Ms Maharjan’s results from the University of Ballarat, and a medical certificate. Also attached were statements of money transfers from Nepal in relation to Ms Maharjan, which identified the “ordering customer” as her mother, and the “ordering customer’s address” as a location in Nepal. A receipt from the Westpac Banking Corporation in relation

to that transfer was also attached, as were some bank statements from the Commonwealth Bank. Further documents from Nepal, such as Ms Maharjan's school leaving certificate were also attached.

9 9 On 12 March 2013, one day after the application form was submitted, an officer of the Department wrote to the appellants' migration agent seeking further information. The request included the following:

Financial Requirements

Please provide evidence that you have sufficient funds to support yourself, and any family members accompanying you, for the first 24 months of your stay in Australia, or for the duration of your course of study, if that is less than 24 months.

10 10 The communication went on to explain the amount of funds of which Ms Maharjan was required to provide evidence. It also explained that financial support could only be provided by "eligible family members" for the purposes of satisfying this criterion.

11 11 The communication then stated:

All applicants must demonstrate at least a 3 month saving history of their funds. The savings history is calculated for the 3 month period immediately before the lodgement of your application on 11/03/2013.

12 12 The communication contained a number of other pieces of information about how Ms Maharjan could go about supplying sufficient evidence, which need not be set out here. Ms Maharjan was also advised about the steps she needed to take to complete health assessments. All the matters drawn to Ms Maharjan's attention, and that of her agent, in this letter were relevant to satisfaction of the criteria necessary for the grant of the visas sought.

13 13 By an email dated 21 March 2013, the appellants' migration agent replied to the delegate's request attaching a number of documents. The agent stated:

Please find the attached documents as you requested in your email dated 12 March 2013. Attached documents are as follows.

- 1) Bank statement page 1
- 2) Bank statement page 2
- 3) Balance certificate from Nabil Bank
- 4) Relationship certificate
- 5) Financial support statement letter from sponsor
- 6) Medical and X-ray done receipt of applicants.

14 14 The two bank certificates were issued by the Nabil Bank in Nepal, or at least purported to be. Ms Maharjan's mother provided the financial support statement the delegate had required.

15 15 The next communication from the delegate occurred on 9 July 2013. In that communication the delegate invited Ms Maharjan, through her migration agent, to comment on information obtained by the delegate. The delegate informed Ms Maharjan that he had information suggesting she had provided or caused to be provided a "bogus document or false or misleading information" in relation to her visa application and accordingly that she, along with her spouse, may fail to satisfy PIC 4020.

16 16 The delegate stated:

As part of your Vocational Education and Training Sector (subclass 572) visa application, you were requested to provide evidence of sufficient funds to support yourself and any family members during your stay in Australia. In response to this request you provided, amongst other documents, a Bank Statement from Nabil Bank in the name Ganga Maharjan, account number [redacted].

This bank statement was referred to an Immigration Office overseas for verification.

An Immigration Officer spoke to a representative from Nabil bank who verified the savings account number [redacted] in the name of [redacted] and present balance is [redacted]. He further provided following information about the account:

- Account opening date as 20/12/2012 (verified twice).
- Residential address: [redacted]
- Contact number of account holder as [redacted]

The account statement provided by the applicant is from 22 August 2012 whereas the account opening date is 20 December 2012. All the transactions were checked and following information was obtained:

- Initial deposit was [redacted] till 17/03/2013 whereas the applicant's statement shows the funds as [redacted] which was verified as fraudulent by the bank.
- Bank verified that the account had a maximum balance of [redacted] in April 2013 with a deposit of [redacted] as cash and subsequently withdrawn by the account holder on numerous occasions.

The Immigration Officer then called the account holder [redacted] (Sponsor) and she verified that she is sponsoring her daughter in Australia. She was asked about the funds and she stated that she is unaware about the account details but she verified that [redacted] is available in the account. She was asked what the account opening date is and she verified that the account was opened 5 or 6 months back. She was asked if the account was opening in mid of last year (2012) and she stated that account was opened in December 2012 or January 2013.

Whilst the bank has verified that the funds are available, the bank statement provided by the applicant or sponsor is fraudulent. Also, the bank manager and sponsor verified that the account was opened in December 2012 whereas the account statement is from August 2012. It is implausible that the account statement is generated before opening the account. Also the transactions were verified and they also differ. Therefore the bank statement provided is considered to be non-genuine.

[Identifying and personal information redacted.]

17 17 We note, because a contrary proposition assumed some prominence in the Minister's submissions, that the delegate considered the documents supplied by the appellants' agent on 21 March 2013 had been supplied "As part of your vocational Education and Training Sector (subclass 572) visa application..." We return to this at [108]-[111] below.

18 18 Although the figures have been redacted, it is the case, as the appellants' counsel noted in submissions, that on the information provided by the Nabil Bank and despite the alleged fraud, Ms Maharjan's mother held sufficient funds over the required period to satisfy the visa criterion in any event.

19 19 The delegate's decision was made on 20 May 2014, a considerable time after the submission of the documents by the appellants. Consistently with the invitation to comment extracted at [16], the delegate found that Ms Maharjan did not satisfy PIC 4020 because the bank statements provided by the appellants' migration agent to the delegate in support of the visa application were, in the delegate's opinion, fraudulent. There was on any view a clear basis for that finding, enquiries having been made by staff at the Australian High Commission in New Delhi of the bank in Nepal. The delegate concluded (in language identical to that contained in the invitation to comment):

Whilst the bank has verified that the funds are available, the bank statement provided by the applicant or sponsor is fraudulent. Also, the bank manager and sponsor verified that the account was opened in December 2012 whereas the account statement is from August 2012. It is implausible that an account statement was generated before opening of the account. Also the transactions were verified and they also differ. Therefore the bank statement provided is considered to be non-genuine.

20 20 The appellants sought review of the delegate's decision in the Tribunal, by way of an application made on 22 May 2014. In that review, the appellants made two substantive arguments before the Tribunal. The first was that the Tribunal should be satisfied that the appellants met the PIC 4020 criteria, and the second was that if the Tribunal was satisfied they did not meet those criteria, it should waive the requirements in PIC 4020(1) as the Tribunal was authorised to do by PIC 4020(4).

- 21 21 The Tribunal rejected both arguments. In its reasons, it set out the findings of the delegate about the fraudulent nature of the bank statements and, we infer, adopted those findings. The Tribunal recounted the explanations given at the hearing before it by Ms Maharjan and her adviser concerning the bank statements. At [10]-[11], the Tribunal recorded the claims made by Ms Maharjan, incorporating information provided by her mother from Nepal, to the effect that the mother had hired an agent in Nepal to arrange for the provision of the bank documents and that agent had acted fraudulently in providing false documents. In a submission to the Tribunal, the appellants' agent claimed the mother had complained and the Nepalese agent was under investigation by "the concerned authorities in Nepal".
- 22 22 The Tribunal made no findings of fact on Ms Maharjan's claims that she and her mother had been innocent victims of a fraud perpetrated by the Nepalese agent. Rather, the Tribunal found (at [12]-[13]):

The Tribunal emphasised that PIC 4020 applied if an applicant has given, or caused to be given to the Minister or an officer of the Department a bogus document or information that was false or misleading in the context of a Student visa application; and that this applied whether or not the document was provided by the applicant knowingly or unwittingly. Further, the Tribunal noted that the fact that the applicant's compliance with visa conditions, such as completing a course and being able to meet the financial requirements for the visa applied for, was not relevant to this review. The issue before the Tribunal was whether the she [sic] had given or caused to be given, in respect of the visa application which is the subject of this review, a bogus document or information which was false or misleading, which the applicant had confirmed she had. The applicant said she understood this.

Based on all the evidence before it and the considerations and reasoning above, the Tribunal finds that there is evidence that the applicant has given, or caused to be given, to the Department a 'bogus document' (as defined in s.97, see attached) and 'information that is false or misleading in a material particular' in respect of the visa application which is the subject of this review.

- 23 23 The Tribunal then proceeded to consider whether, as an exercise of discretion, the requirements of PIC 4020(1) and (2) should be waived because there were "compelling circumstances that affect the interests of Australia" or "compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen". The Tribunal concluded that there were no such compelling or compassionate circumstances. Although this finding was challenged before the Federal Circuit Court, it was not the subject of any ground of appeal before this Court.
- 24 24 The appellants sought judicial review of the Tribunal's decision in the Federal Circuit Court. By orders made on 25 November 2016, the Federal Circuit Court dismissed the application for judicial review. That date assumes some significance in the appellants'

application for leave to raise a new ground of appeal based on the Full Court's decisions in *Singh* and *Gill*. The date of the Federal Circuit Court orders is approximately one month after the Full Court handed down its orders and reasons in the matters of *Singh* and *Gill*. However, it appears the Federal Circuit Court was not aware of those decisions, and neither of the parties sought to draw the Court's attention to them.

Given the application for leave to amend the notice of appeal, it is unnecessary to describe in detail the findings and reasoning of the Federal Circuit Court. It is necessary only to note what is recorded in the Federal Circuit Court's reasons in relation to grounds 3 and 4 of the judicial review application before it.

At [25]-[28] the Federal Circuit Court stated:

Ground 3

Ground 3 is as follows:

The Second Respondent made jurisdictional error by failing to consider whether fraud by a third party vitiated the visa application process of [sic] that fraud had been perpetrated on the Applicant as well as on the First and The Second Respondents.

The applicant did not, either in her written submissions, or in her counsel's oral submissions, address this ground. It is not apparent, therefore, why the applicant claims the Tribunal ought to have considered whether the fraud involved in the submission by the applicant's agent of fraudulent bank statements also constituted a fraud against the applicant. Such inquiry would not have been relevant to whether the fraudulent bank statements were "*bogus documents*". As the Full Federal Court held in *Trivedi*, a document will be counterfeit within the meaning of s.97 of the Act if the document is purposely untrue, even if the visa applicant was unaware the information was purposely untrue. Nor would such inquiry have been [sic] relevant to determining whether the purported bank statements conveyed information that was false or misleading in a material respect.

Ground 3, therefore, also fails.

Ground 4

Ground 4 formally challenges the correctness of the Full Court's decision in *Trivedi*. The applicant accepts that this ground cannot succeed in the light of *Trivedi*.

(Footnotes omitted.)

Relying on these passages, the appellants submit that although the "jurisdictional fact" ground was not agitated before the Federal Circuit Court, the appellants had clearly contended that there had been a fraud by a third party (namely the Nepalese agent) which "vitiates" the visa application process, and that it was a fraud perpetrated on the appellants as well as on the Minister's delegate. Although counsel frankly acknowledged that before the

Federal Circuit Court, these arguments were put by reference to the Full Court in *Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42; 220 FCR 169, he nevertheless submitted that the way these grounds were framed before the Federal Circuit Court indicated the core allegation that there had been fraud by a third party against the appellants was a matter raised before the Federal Circuit Court.

RESOLUTION

The application for leave to amend the notice of appeal

28 28 The appellants seek leave to raise the following single ground of appeal, and confirmed they did not otherwise press the grounds in their existing notice of appeal:

The Federal Circuit Court erred by not deciding the jurisdictional fact of whether fraud had invalidated the visa application or the visa application process.

29 29 The appellants were granted provisional leave to file the proposed notice of appeal in Court at the hearing of the appeal. The form of the proposed ground was identical to the draft notice attached to the appellants' written outline of submissions, filed approximately two weeks before the appeal.

30 30 The Minister did not contend he had insufficient notice of the proposed ground, and indeed dealt principally with the proposed ground in his written submissions.

31 31 The principles in relation to permitting a ground to be raised on appeal for the first time are not in dispute, although their application may give rise to differences of judicial opinion. In *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73 at [19]-[20], Griffiths and Perry JJ set those principles out:

The general principles guiding the decision whether or not to permit a ground to be raised on appeal which was not run below are well settled. They are reflected in the following observations of the Full Court in *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 158; 238 FCR 588 at [46]-[48] (and which were recently reaffirmed in substance by Flick and Rangiah JJ in *Sun v Minister for Immigration and Border Protection* [2016] FCAFC 52; 243 FCR 220 at [89]-[90]):

46 In our view, the application for leave to rely upon the sole ground of appeal now raised should be refused. Leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interests of justice to do so: *O'Brien v Komesaroff* (1982) 150 CLR 310; *H v Minister for Immigration & Multicultural Affairs*; and *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [20]-[24] and [38].

47 In *Coulton v Holcombe* (1986) 162 CLR 1, Gibbs CJ, Wilson,

Brennan and Dawson JJ observed, in their joint judgment, at 7:

“It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.”

- 48 The practice of raising arguments for the first time before the Full Court has been particularly prevalent in appeals relating to migration matters. The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused. In our view, the proposed ground of appeal has no merit. There is no justification, therefore, for permitting it to be raised for the first time before this Court.

In *Summers v Repatriation Commission* [2015] FCAFC 36; 230 FCR 179, in discussing the relevant principles, the Full Court stated at [94] that, generally speaking, leave is more likely to be granted to permit a fresh issue to be raised on appeal where the new point turns only upon a question of construction or upon a point of law, or where the facts are not in controversy. A Full Court constituted by five Justices approved that passage in *Haritos v Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315 at [79].

- 32 32 There are other Full Court authorities which could be understood as placing greater emphasis on other factors and especially on holding a litigant to her or his “case” as run at first instance (see *Sun v Minister for Immigration and Border Protection* [2016] FCAFC 52; 243 FCR 220 at [89] (Flick and Rangiah JJ, Logan J agreeing)) but in our opinion the passage above represents the applicable law. The touchstone is always the interests of the administration of justice. Sometimes those interests will favour holding a litigant to her or his case at first instance, sometimes not.

- 33 33 An important consideration is the merit of the new ground sought to be raised. We consider the proposed ground of appeal to have merit. We also consider there is no relevant prejudice to the Minister. The Minister had adequate notice of the new ground and dealt with it in submissions. The brevity of the Minister’s written submissions on the new ground (indeed, on the whole appeal) was a matter of forensic choice. Given the relief sought by the appellants involves the matter going back to the Federal Circuit Court where the Minister will be at liberty to call evidence and to test Ms Maharjan’s claims about being an innocent victim of a fraud in whatever manner the Minister sees fit, we do not consider the proposed ground of appeal raises any evidentiary issues which should tend against the grant of leave. Rather it

raises only a question of law: did the Federal Circuit Court err in not deciding for itself, as a matter of jurisdictional fact, whether because of Ms Maharjan's claim to be an innocent victim of third party fraud, there was no valid visa application before the delegate, and consequently no foundation for an exercise of jurisdiction by the Tribunal. We set out in more detail below how the Full Court in *Singh* and in *Gill* determined that the Federal Circuit Court could and should deal with claims of third party fraud giving rise to these issues.

34 34 The application of the Full Court's decisions in *Singh* and *Gill* to a claim of fraud such as that made by the appellant raises matters of both personal and public interest and this may favour a grant of leave: see *Singh* at [51], where the Full Court said:

The issue of the operation of s 48 of the *Migration Act* where it is claimed that there has been fraud by a third party on a visa applicant, which fraud has affected the decision-making process in relation to that visa application, is a matter of real interest to both the appellant and the Minister. Furthermore, the issue is one which affects not only the appellant here, but also other visa holders whose visa applications are rejected in circumstances where there is fraud on the part of a migration agent or third party and the relevant statutory processes are also stultified. There is considerable public interest in the due and lawful administration of statutory provisions in the *Migration Act* relating to such matters as the making of visa applications and their determination and review in circumstances where there has been fraud on the part of a third party. As the High Court observed in *SZFDE* at [11], these concerns, which arise in a public law context, relate to the due administration of the laws of the Commonwealth and have important constitutional underpinnings.

35 35 As the Full Court pointed out at [52], whether or not a court exercising judicial review jurisdiction determines ultimately to grant declaratory relief will depend on a range of matters. The point here, as the appellants correctly submit, is that the Federal Circuit Court did not determine whether the jurisdictional fact necessary for a valid decision by the delegate and by the Tribunal existed.

36 36 There can be no real criticism made of the Federal Circuit Court in relation to this failure. The decisions in *Singh* and *Gill* were not drawn to its attention. No legal arguments similar to those made in *Singh* and *Gill* (even if not expressly relying on those cases) were put to the Court. Although, as we have set out above, arguments concerning the effect of the asserted fraud were put, it cannot be said they were put in the same terms the arguments were put in *Singh* and *Gill*. Nevertheless, the law is as the Full Court has stated in *Singh* and *Gill*. The Minister did not make any submission to this Court that either of those cases were wrongly decided and should be overruled. An application for special leave by the Minister in *Singh* was refused: see *Minister for Immigration and Border Protection v Singh & Anor* [2017] HCATrans 79.

37 Ms Maharjan should have the opportunity to seek to establish her allegation that there is no valid visa application because of a third party fraud on her, which stultified the assessment and determination of her visa application in accordance with the processes set out in the *Migration Act*. It is not in the interests of the administration of justice that she be deprived of that opportunity.

The Full Court's decisions in *Singh* and *Gill*

38 It is necessary to explain each of the decisions in *Singh* and *Gill*, in order to appreciate how, contrary to the Minister's submissions, they are capable of applying to the appellants' circumstances.

39 In each of these appeals, the appellant had engaged a migration agent from a firm known as "S & S Migration". In each of the cases the appellant had poor English and had given no more than general instructions to the migration agent about what he wished to secure by way of a visa. In *Singh* the appellant's evidence to the Tribunal was that he had told his agent that because he was experiencing difficulties in his marriage, he wanted his own visa and asked the agent to obtain a visa ("like a visa to study English language or a visa to study plastering"): see [8] of the Full Court's judgment. He paid the agent a substantial amount of money and the appellant's evidence was that the agent submitted the forms and interacted with the Department. In *Gill*, the appellant gave evidence to the Federal Circuit Court to the effect that he told his migration agent he wanted to study English or to study cooking. Again having paid the agent a substantial amount of money he left the conduct of the visa application to the agent. In both cases the agent procured, through what the Tribunal found to be fraudulent means, skills assessments for each visa applicant and applied on their behalf for skilled work visas. At both the Tribunal and the Federal Circuit Court level, it was accepted that neither applicant could legitimately qualify for such a visa and that each skills assessment was purposely false.

40 There have been many cases in this Court and in the Federal Circuit Court involving the conduct of S & S Migration in visa applications. Various arguments have been made, and the decisions reflect the arguments made, and the fact finding, in each case. There have been no uniform outcomes, despite the underlying substratum of apparently dishonest conduct by S & S Migration which forms a backdrop to many cases. For example, in *Singh v Minister for Immigration and Border Protection* [2015] FCAFC 151 (Kenny, Besanko and Perram JJ), there was no finding of fraud on the visa applicant by the migration agent. In that case, the

Full Court considered (at [48]) that there was no basis to interfere with the Federal Circuit Court's finding that the migration agent acted by mistake, rather than fraud, and considered that on the facts, it was conceivable that the visa application may have been made in error or on the appellant's instructions. The Full Court held, at [53], that once it was concluded that there was no fraud on the part of the migration agent, s 98 of the *Migration Act* deemed the appellant to have completed the visa application form himself. The Full Court expressly stated (at [55]) that without such a finding of fraud, there was no basis to further consider the question of stultification or complicity.

We turn to consider the decision in *Gill* in more detail, and then *Singh*.

Gill

In *Gill*, the delegate found that PIC 4020 was not satisfied because of the submission of "bogus documents" to the Minister. On review before the Tribunal, the appellant in *Gill* claimed that he had been the victim of fraudulent conduct by his former migration agent and that the agent had, without his knowledge, provided false information on his visa application. He submitted to the Tribunal that, as a result of the fraudulent conduct, his visa application was invalid. For a number of reasons which need not be set out here but which can be found in the Full Court judgment in *Gill* at [8] the Tribunal found the agent had acted fraudulently and had fabricated the claims in order to deceive both the appellant and the Department into believing that a valid visa application had been lodged. However the Tribunal went on to find (see [9] of the Full Court judgment), again for reasons that need not be set out here, that the appellant was "complicit" in the fraud. The Tribunal concluded that PIC 4020 was not satisfied and there was no basis for the requirement to be waived.

On judicial review in the Federal Circuit Court, the appellant challenged the Tribunal's conclusion that he was complicit in his agent's fraud, both as to the Tribunal's fact finding and as to the correct test for determining complicity. The appellant also contended that the Tribunal lacked jurisdiction because there was no valid visa application and therefore no "MRT-reviewable decision". It is important to note at this point, as we develop below, that the argument was not that the delegate's decision was invalid and therefore the Tribunal had no jurisdiction, but rather that there was no valid visa application to begin with, and for that reason, the Tribunal had no jurisdiction, given the express provisions in the *Migration Act* prohibiting consideration of a visa application which is not valid (see s 47(3)). Ultimately, only this jurisdictional ground was pressed before the Federal Circuit Court. As the Full

Court noted at [15] of its reasons, the appellant was apparently cross-examined at some length before the Federal Circuit Court.

44 44 The Federal Circuit Court accepted that the appellant's argument raised a jurisdictional fact which the Court had to determine for itself based on the evidence before it: see *Gill* at [17]. The characterisation of the question of whether or not there had been a valid visa application as a jurisdictional fact is a characterisation made by Perram J in granting leave to appeal in *Prodduturi v Minister for Immigration and Border Protection* [2014] FCA 624; 142 ALD 550 at [13]; see also *Gill* at [19]. Again, without setting out all the findings made by the Federal Circuit Court, the relevant and ultimate finding made was that the appellant was "indifferent" in his relationship with his migration agent and this "indifference" amounted to a general authority to the agent, such that it could not be said that the appellant was entitled to any relief by reason of the agent's fraud.

45 45 It was this finding by the Federal Circuit Court about the appellant's "indifference" to the fraudulent actions of his agent, and the absence of any positive finding that the appellant was complicit in fraud, which formed the basis of the appeal to the Full Court. The appellant also challenged a finding by the Federal Circuit Court that the delegate's procedure had not been stultified, contending before the Full Court that the Federal Circuit Court misunderstood which process was stultified by the agent's fraud. The appellant contended it was not the procedures before the Minister's delegate and the Tribunal which were relevantly stultified but rather the relevant process was the "legal consequences which attached only to valid visa applications for the purposes of ss 46, 47, 48, 49 and 98 of the *Migration Act*": see *Gill* at [25]. The appellant sought relief in the nature of an order quashing the Tribunal's decision and a declaration that there was no valid visa application within the meaning of s 46 of the *Migration Act*. Alternatively the appellant sought an order remitting the matter to the Federal Circuit Court for rehearing. Ultimately, for reasons we set out below, the Full Court made the latter order. The appellant in *Gill* accepted on the appeal there was no point in the matter going back to the Tribunal because he could not under any circumstances satisfy the requirements for the grant of a skilled visa.

46 46 The Minister submitted to the Full Court in *Gill* that the visa application was valid and further submitted that even if it were not, there was no utility in any relief which the Full Court could grant. The Minister submitted there was no error in the Federal Circuit Court's finding concerning indifference either as to fact or as to law and the Court was correct to find

there was no stultification of Tribunal processes. In this respect the Minister submitted the situation was quite different from the situation in *SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35; 232 CLR 189 where the High Court found there was a fraud on a visa applicant which also stultified the Tribunal's processes under Pt 7 of the *Migration Act*. Relying on the Full Court decision in *Prodduturi v Minister for Immigration and Border Protection* [2015] FCAFC 5; 144 ALD 243, the Minister contended that under s 476 of the *Migration Act* the Federal Circuit Court could only grant relief in relation to the Tribunal's decision, which would leave unaffected the decision of the Minister's delegate. For that reason there would be no utility in the Federal Circuit Court granting relief in relation to the Tribunal's decision. These arguments are set out by the Full Court in *Gill* at [33]-[38].

47 47 For reasons that are not relevant to the determination of the present appeal, the Full Court in *Gill* found that the Federal Circuit Court had not taken the correct legal approach in determining what could and could not constitute "indifference" for the purposes of deciding how fraudulent conduct did or did not affect the validity of the visa application: see [41]-[45]; [48]-[49].

48 48 The Full Court's analysis in *Gill* of the operation of legal principles concerning fraud in public law is, however, important. At [46] of *Gill*, the Full Court said:

46. In *SZSXT v Minister for Immigration and Border Protection* [2014] FCAFC 40; 222 FCR 73 (**SZSXT**), Perram, Robertson and Griffiths JJ summarised some relevant principles established in *SZFDE* relating to fraud in a public law context, including a migration case. Those principles are set out in [51] of *SZSXT* (the paragraph references are to *SZFDE*):
- (a) in the framework of general legal principle, fraud can come in various guises and is 'infinite in variety' [8];
 - (b) different considerations may arise when fraud is alleged in a public law case, which involves the due administration of Commonwealth laws and has an important constitutional underpinning in Ch III of the Constitution [11];
 - (c) 'fraud' can attract different meanings in private and public law and in the latter context has been used in a broad sense which encompasses 'bad faith' [17];
 - (d) in a case seeking certiorari based on the fraud of a third party, there is no requirement that one of the parties to the litigation be privy to the fraud [20];
 - (e) another practical aspect of fraud in public law which may set it apart from fraud in civil law is that 'often a victim of it will have no useful remedy except to have the fraudulently affected result set aside and a fresh untainted hearing conducted' [22];

- (f) in a public law case, fraud is not limited to that of a decision-maker, a party or a party's representative [25]-[27]; and
- (g) there was no necessity in *SZFDE* to determine at large and in generally applicable terms the scope for judicial review for 'third party fraud' of an earlier administrative decision where the judicial review applicant did not collude in the fraud and was not aware of it at the time [28]. But in the particular circumstances in *SZFDE* the rogue's fraudulent dealings with the family had the effect of disabling the Tribunal from duly discharging its imperative statutory functions in conducting a review, such that there had also been a fraud 'on' the Tribunal which meant that the Tribunal's jurisdiction remained constructively unexercised [51]-[52].

49 49 In the context of the arguments on the present appeal the matters referred to in (a), (e) and (g) are of particular relevance.

50 50 The Full Court in *Gill* went on to say at [47]:

The first and last of those principles from *SZFDE* have particular relevance in this appeal. Recognition that fraud can arise in a wide range of factual circumstances, such that it is apt to describe the range as "infinite in variety", highlights the undesirability of prescribing in generally applicable terms the scope for judicial review where there is third party fraud. It is critical to pay close attention to both the particular facts and circumstances in which the issue of fraud arises and also to the terms of any specific legislative provision which may be affected by the fraudulent conduct of a third party, such as a migration agent.

51 51 These matters answer the contentions put on behalf of the Minister that there were some clear limits already established by the authorities concerning what kind of third party fraud could render a visa application invalid. Both the extract from *SZSXT* and [47] of the Full Court's reasons in *Gill* make it plain that is not the case.

52 52 As we have noted, the remainder of the Full Court's reasoning in *Gill* predominantly concerned the concept of "indifference": what that meant and how it was to be established. That is not a matter relevant to the issues in the current appeal. However at [50], albeit in the context of resolving the contentions about "indifference", the Full Court in *Gill* made a broader statement of principle, which in our opinion is relevant to the current appeal. It said:

We accept the appellant's submission that the operation of provisions such as ss 45 to 48 and 98 of the *Migration Act* and PIC 4020 can be affected by the fraudulent conduct of a migration agent in circumstances where the visa applicant has not colluded in that fraud and there is no evidence to support a finding that the visa applicant was indifferent as to whether the agent used unlawful or dishonest means to obtain a visa. As noted above, the Minister ultimately did not contest that s 98 would not apply to a visa applicant who has relied upon a migration agent to fill out a visa application form and the agent perpetrates a fraud on the visa applicant. In our view, that acknowledgment was properly given.

53 This statement of principle recognises two matters. First, it is critical to establish whether the visa applicant colluded in the fraud or was, as the Full Court put it, “indifferent as to whether the agent used unlawful or dishonest means to be obtain a visa”. Those concepts, of collusion and indifference, while applicable to the conduct of an Australian migration agent, are equally applicable to the conduct of any third party engaging in fraudulent conduct for the purposes of obtaining a visa for an applicant. At the level of general principle it is important to also repeat what the Full Court in *Gill* said at [52]: namely, that:

issues of fraud in a public law context were *sui generis* and are not to be equated with cases involving the creation and protection of personal and property rights in inter partes litigation where common law and/or equitable principles concerning fraud may arise for determination.

54 Second, the relevant stultification in such circumstances relates to the prescriptive and specific requirements in the Act concerning consideration of valid visa applications, and non-consideration of visa applications which are not valid.

Singh

55 We turn now to discuss, to the extent necessary, the circumstances in *Singh*. In *Singh*, the appellant contended to the Tribunal on review that his agent had engaged in fraudulent conduct without his authorisation or knowledge. As the Full Court’s reasons in *Singh* set out (see [8]-[12]) the Tribunal expressed some doubts about whether the appellant was, in fact, the victim of an “outright fraud” committed by his agent. Ultimately, although the Tribunal found the migration agent had acted fraudulently and that his conduct was motivated by “greed and the pursuit of money”, the Tribunal found, for a number of reasons that need not be set out here, that the appellant was complicit in the fraud committed by the agent. It did so also by reference to the concept of “indifference”, but in *Singh* there were findings which were rather more critical of the appellant, such as that he was “not too particular” about how he got his visa.

56 On judicial review before the Federal Circuit Court (see *Singh v Minister for Immigration* [2015] FCCA 509), the appellant in *Singh* also contended that the Tribunal had erred in finding there was a valid visa application and that, as a consequence, it had erred in finding it had jurisdiction to review the delegate’s decision.

57 It is worth noting that, not unlike the present proceeding, the Federal Circuit Court in *Singh* had to deal with the circumstance where a potentially relevant Full Court decision was

handed down while it was reserved on its own judicial review. In *Singh*, the relevant Full Court decision was *Prodduturi*, which was handed down approximately six weeks after the Federal Circuit Court in *Singh* had reserved its decision. As the Full Court in *Singh* notes at [19], after *Prodduturi* was published, the Federal Circuit Court invited the active parties to file written submissions concerning the significance of that decision to the matters before the Federal Circuit Court, and both parties took up that invitation. In the present proceeding there is no evidence one way or the other whether the Federal Circuit Court was aware of the Full Court's decisions in *Singh* and *Gill*. Certainly neither the Minister nor the appellants submit to this Court that any party drew the Federal Circuit Court's attention to these two decisions, and neither *Singh* nor *Gill* are referred to in the Federal Circuit Court's reasons for judgment.

58 58 Ultimately the Federal Circuit Court in *Singh* decided that it had no jurisdiction to hear and determine the application for judicial review, as amended. It accepted the Minister's submission that there was no utility in the proceeding because the appellant admitted that he was not eligible for a skilled visa, and the only jurisdiction the Federal Circuit Court had was to review the decision of the Tribunal so long as it was not a "primary decision" (as defined in s 476(4) of the *Migration Act*). The Federal Circuit Court concluded that even if there had been fraudulent conduct stultifying the decision-making processes in the sense explained by the High Court in *SZFDE*, any jurisdictional error could not make a material difference to the Tribunal's decision because the appellant had correctly acknowledged that he did not and could not satisfy the criteria for a skilled visa. The Federal Circuit Court also applied the then recent Full Court decision in *Prodduturi*, determining that even if it set aside the Tribunal's decision, the delegate's decision remained and that was sufficient to trigger the effect of s 48 of the *Migration Act*, precluding the appellant from applying for a further visa. Since the Federal Circuit Court had no power to set aside the delegate's decision, no relief could be granted to alter this position. The Federal Circuit Court noted that although reference had been made in the appellant's closing submissions to declaratory relief, there had been no formal application to amend the judicial review application to include a request for declaratory relief.

59 59 On appeal before the Full Court, the appellant contended the Federal Circuit Court had erred in finding there was no utility in the judicial review application. At [22] of the Full Court's reasons in *Singh*, the Court set out how the appellant's arguments were put:

The sole ground of appeal is that the primary judge erred in finding that there was no utility in circumstances where the appellant asserts that:

- (a) there is utility in the relief sought by him because of the potential effect on the operation of s 48 of the *Migration Act* of the principles of issue estoppel and the principles in *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; 209 CLR 597 (*Bhardwaj*); and
- (b) the primary judge erred in finding that the proceedings were wrongly constituted because the Minister's delegate was not a party in circumstances where, as the appellant submitted, it was sufficient to name the Minister as a party (which necessarily included any delegate).

60 60 The second point can be shortly noted in these reasons. On that matter, the Full Court in *Singh* found that the Full Court in *Prodduturi*, was plainly wrong in deciding a delegate needed to be named as a party. Rather, it was sufficient to name the Minister: see *Singh* at [37]. Otherwise, the Full Court in *Singh* found that *Prodduturi* was distinguishable. It did so for several reasons. First, the appellant in *Prodduturi* had not sought declaratory relief. In contrast, the Full Court in *Singh* held that in substance, the appellant in *Singh* had done so before the Federal Circuit Court. The Full Court went on to hold, for reasons that it set out at [41]-[52], that there was utility in the grant of declaratory relief by the Federal Circuit Court.

61 61 Second, and critically, at [35] the Full Court in *Singh* held that the Court's attention in *Prodduturi* was not drawn to cases such as *Minister for Immigration and Border Protection v Kim* [2014] FCAFC 47; 221 FCR 523, which held that the question of the validity of a visa application was a matter that could and should be determined objectively by the Court. In *Kim* the validity concerned whether a child had capacity to consent or agree to the lodging of a visa application on her or his behalf, but the difference in the nature of the invalidity alleged does not affect the underlying requirement that the Court should determine the validity of the application. As the Full Court in *Singh* noted at [35], in *Kim* the relief granted was declaratory.

62 62 Third, in *Prodduturi* the relief sought by the appellant was an order that the delegate's decision be set aside. This is what had prompted the Court's consideration in *Prodduturi* of the jurisdiction of the Federal Circuit Court to make such an order. And it was from this that the Full Court's consideration in *Prodduturi* of the lack of utility in granting any relief in relation to the Tribunal's decision arose.

63 63 The Full Court in *Singh* then concluded (at [39]):

These matters provide a sufficient basis for distinguishing *Prodduturi* and confining it to its own particular circumstances. The reasoning in *Prodduturi* is not determinative of the issue of jurisdiction here for the following reasons:

- (a) Unlike the position in *Prodduturi* no application is or was made in the

present proceeding to have the delegate's decision set aside.

- (b) The FCCA plainly did have jurisdiction here to review the Tribunal's decision and, in an appropriate case, to set aside that decision on the grounds of non-complicitous fraud on the part of the visa applicant and to declare that the original visa application was invalid. Such a declaration would have foreseeable consequences for the parties (see further below).
- (c) We consider that the observations in *Bhardwaj* at [8] per Gleeson CJ and at [53] per Gaudron and Gummow JJ concerning the power or duty of an administrative decision-maker to "self-correct" or proceed to make a fresh decision with respect to a person's rights where an earlier decision is vitiated by jurisdictional error apply equally where there is fraud (see *Craig v South Australia* [1995] HCA 58; 184 CLR 163 at 175-176 and *Kirk v Industrial Court (NSW)* [2010] HCA 1; 239 CLR 531 at [97]). In our view, while it may be true to say that the delegate's decision remains in place notwithstanding that a decision of the Tribunal has been set aside, that is not to say that the delegate's decision has the same legal efficacy after a court has set aside a Tribunal decision and declared that no valid visa application had been made because of fraud.
- (d) If the Minister (or his delegate) does not take the course of self-correction in the light of the declaratory order, it would be open to the appellant to commence proceedings in the High Court under s 75(v) of the *Constitution*, to seek to have the delegate's decision set aside and to take advantage of any estoppels which might arise from the separate and earlier FCCA proceedings. In his written submissions, the Minister also contended that it might be possible for a person in these circumstances to bring proceedings in the FCCA. The basis for that contention involved a complex analysis which focused on the inter-relationship between a refusal to consider a visa application and the operation of s 65 of the *Migration Act* and whether such a refusal would constitute a 'primary decision' as defined in s 476(4) so as to deny the FCCA jurisdiction under s 476(2). It is unnecessary to express a view on these matters for the purposes of disposing of the appeal.

64 64 It is precisely this argument, adhering closely to these principles as set out by the Full Court in *Singh*, that the appellants seek to advance in the present appeal. For the reasons set out by the Full Court in *Gill* and *Singh*, we consider that *Prodduturi* is also distinguishable in relation to the present appellant's contentions in this appeal.

The underlying purpose and utility of a declaration of invalidity in relation to a visa application

65 65 In both *Singh* (at [14]) and *Gill* (at [14]), the Full Court identified the utility and purpose of declaratory relief, from the perspective of an appellant affected by an alleged fraud in relation to a visa application. It suffices to repeat what was said by the Full Court in *Gill* at [14] on this matter:

As was the case in *Singh*, the appellant's primary objective in bringing the judicial review challenge was to avoid the operation of s 48 of the *Migration Act 1958* (Cth) (the *Migration Act*) and PIC 4020(2) and the limitation those provisions placed on

his ability to make a fresh visa application in Australia arising from the finding that the public interest criterion applied to the circumstances of his case.

66 66 In the extract we have reproduced at [48] above, the Full Court in *Gill* identified the practical and legal limits of how a victim of third party fraud in relation to the making of an administrative decision can seek a useful remedy. As the Full Court in *SZSXT* noted, it will usually be the case that the only remedy of any use to the victim of fraud will be to have the fraudulently affected result set aside and a fresh and untainted process conducted. That is also the point made by the High Court in *SZFDE* at [22].

67 67 At times, it appeared the Minister’s submissions impliedly suggested there was some difficulty or inappropriateness with such a purpose. The current authorities are against any such proposition. The concept of a valid visa application is a central underpinning concept in the structure of the *Migration Act*. Further, the *Migration Act* does not evince an intention that fraud by a third party on or against an “innocent” visa applicant is to have no effect on the processes required by the Act, at least not where those processes are stultified by the fraud.

The decision in *Trivedi*

68 68 It remains to consider another Full Court decision, which the Minister contended precluded the appellants from succeeding on this appeal. That is the decision of *Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42; 220 FCR 169.

69 69 *Trivedi* concerned an applicant for a student visa and the submission by her, as part of the satisfaction of the necessary visa criteria, of an IELTS English test. The first appellant’s evidence was she had taken that test while on a visit to India, rather than having taken it in Australia. In order for the relevant visa criterion to be met, the first appellant needed to establish that she had “competent” English. The regulations required the first appellant to obtain certain scores on the IELTS English test for each of the four components: listening, reading, writing and speaking. In each component, she was required to achieve a score of at least 6.0. She had provided, in support of her visa application, a copy of the test report form and reference numbers for the test she completed in India. The test report form she submitted showed she had received the following results: listening – 6.5, reading – 6.0, writing – 6.5 and speaking – 6.0. Those results would have been sufficient to satisfy the visa criterion. However as part of assessing the visa application, the Minister’s delegate used an online verification service to confirm the first appellant’s scores. That verification service showed

the first appellant had in fact obtained two scores less than 6.0: namely, for writing and speaking. That meant she did not satisfy the relevant visa criterion. These matters were drawn to her attention by correspondence from the delegate and she was invited to comment. One of the responses provided on behalf of the first appellant through her migration agent was that she said she was “misguided by certain agents in India”. She gave an account to the Tribunal of what had happened at her IELTS test in India in which she suggested that the supervisor at the IELTS test had deceived her into giving him her former result and assuring her he will “fix up” the new result. Thus the first appellant sought to suggest to the Tribunal that the copy of the test results with which she had been provided and which she submitted to the Department was a test result that had been fraudulently altered by the supervisor in India. She maintained to the Tribunal that until notified by the Department, she genuinely believed she had passed the IELTS test in India.

70 70 The Tribunal found that the test report in hard copy submitted by the first appellant contained false or misleading information because the scores contained in the report were not correct. It found, by reference to the decision of *Vyas v Minister for Immigration and Citizenship* [2012] FMCA 92, that for the purposes of satisfaction of the requirements of PIC 4020, it did not matter whether the document had been provided to the Minister by an applicant knowingly or unwittingly, and that it was unnecessary to consider the applicant’s “knowledge or otherwise” of the falsity of the document. The Tribunal also declined to waive the requirements of PIC 4020(1).

71 71 The issue on judicial review, first before the then Federal Magistrates Court of Australia and then on appeal to the Full Court of this Court, concerned the Tribunal’s reliance on the decision of *Vyas*. Before the Federal Magistrates Court, the appellants’ argument was that PIC 4020 only applied if the first appellant intended to mislead the Minister and his Department. The Federal Magistrates Court rejected that argument as did the Full Court. However a further argument was made by the Minister: namely that information supplied to the Minister or his Department did not need to be purposely untrue for PIC 4020 to apply, because that criterion was directed to any incorrect information relevant to a visa application. The Minister’s argument was rejected by the Full Court in *Trivedi* (see Buchanan J at [21], Allsop CJ and Rangiah J agreeing).

72 72 At [32]-[33], Buchanan J said:

It is apparent from the terms of PIC 4020 that it addressed the problem of attempts to

work a fraud or deception on the assessment of claims for a visa. That is also evident from the fact that PIC 4020 states a ‘public interest’ criterion, from the narrow and exceptional circumstances necessary to waive its requirements and, more generally, from the serious consequences that follow from its application. I would not infer any apparent intention to disqualify a visa applicant who could explain an innocent mistake in a document or information provided by them. PIC 4020 is not directed, in my view, to innocent, unintended or accidental matters. However, different questions arise when information or documents provided in support of an application are revealed as false, in the purposely untrue sense of that term.

In my view, it should be accepted that an element of fraud or deception is necessary in order to attract the operation of PIC 4020. To take the example of bogus documents, a counterfeit document is not produced accidentally. Similarly, to charge that a statement is false is not to say only that it is wrong. The accusation potentially imports some element of knowledge or intention on somebody’s part, and in my view does so in the present context.

73 73 His Honour also considered that the history of the introduction of PIC 4020 supported this approach, and at [43] his Honour concluded:

In my view, it is not necessary (for reasons yet to be further developed) to show knowing complicity by a visa applicant. That would impose an impossible task on those administering the visa system. But it is necessary that the information or document have the necessary quality of purposeful falsity, whether or not the visa applicant can be shown to have knowledge of that fact.

74 74 His Honour then expressly rejected the appellants’ arguments that it was necessary for the Tribunal to be satisfied that the first appellant was “knowing or complicit in the deceptive character of the information” that she had provided to the Minister and his Department. Reliance was placed by the appellants on two decisions of the High Court: *Cameron v Holt* [1980] HCA 5; 142 CLR 342, and *Murphy v Farmer* [1988] HCA 31; 165 CLR 19, in particular statements by Barwick CJ in *Cameron v Holt* at 346 that “presenting” a false document to an officer required consciousness of its contents and a guilty intent. Buchanan J rejected that argument on the basis that the purpose of PIC 4020 was to “render visa applicants ultimately responsible for the veracity of the information and documents supplied to support the application”: see [49]. His Honour found it was not inconsistent with a coherent public policy for this to be the case, in part because otherwise there would be an “intolerable” and at times “impossible” administrative burden imposed on the visa system if decision-makers needed to be positively satisfied that a visa applicant who provided false or misleading information knew it to be so.

75 75 We do not consider that *Trivedi* stands in the way of the contentions the appellants seek to make on the present appeal, nor does it stand in the way of the application of principles set out by the Full Court in *Gill and Singh*. *Trivedi* is a case about the construction

of PIC 4020. What Buchanan J rejected (with Allsop CJ and Rangiah J agreeing) was the proposition that there was, on the proper construction of PIC 4020, a positive requirement imposed upon the Minister and his or her delegates to be satisfied about a particular state of mind of a visa applicant in relation to information that had been established to be false or misleading, in the sense of being purposely untrue, before PIC 4020 could be applied. As we have set out above, there were good reasons of both construction and policy for that conclusion to be reached.

76 76 To accept that, on a proper construction, PIC 4020 does not require the Minister or her or his delegates to form any positive state of satisfaction about the knowledge of a visa applicant is quite a different proposition from the third party fraud arguments now under consideration. These are positive arguments advanced by an appellant that a fraud was perpetrated against the delegate and against themselves. It will require the appellant to establish the facts upon which the arguments depend.

77 77 The positive arguments that were raised in *Singh* and *Gill*, and in the present appeal, were not raised in *Trivedi*, which concerned only the proper construction of PIC 4020. That is not to say they could not have been raised, but the fact is they were not.

78 78 Where third party fraud is raised, the visa applicant will bear an onus of proof on judicial review. That circumstance differs from a challenge to the lawfulness of a state of satisfaction formed about a visa criterion (PIC 4020). In our opinion, it is now quite clear from the decision of the High Court in *SZFDE*, the decision of the Full Court of this Court in *SZSXT* and the two decisions of the Full Court of this Court in *Gill* and *Singh* that declaratory relief of the kind sought by the appellants in this case is available in public law to an applicant who contends that she or he has been the (innocent) victim of such a fraud, and is able to show that third party fraud stultified a process or processes under the *Migration Act*.

79 79 Different approaches by legal representatives, different forensic choices and different factual circumstances will all contribute to the variety of outcomes one might be able to find on a search of cases in this Court where *Trivedi* has been referred to, or (more recently) where *Singh* and *Gill* have been referred to.

80 80 For example, after the hearing of this appeal, the Minister's counsel referred the Court to *Kumra v Minister for Immigration and Border Protection* [2017] FCA 778 at [26], where Moshinsky J stated:

During the hearing of the appeal, I raised with the solicitor appearing for the Minister whether other decisions of this Court relating to fraud by migration agents had any implications for this matter. The Minister requested leave to file a supplementary submission on this question, which I granted. The Minister subsequently filed a supplementary submission dealing, among other things, with the decisions of the Full Court of this Court in *Singh v Minister for Immigration and Border Protection* [2016] FCAFC 141 and *Gill v Minister for Immigration and Border Protection* [2016] FCAFC 142. The Minister submitted, in summary, that: the findings made by the Tribunal about the conduct of the appellant's agent do not affect the validity of the decision made by the Tribunal on 3 June 2015; and the Full Court decisions in *Singh* and *Gill* are not relevant to the determination of this appeal. The appellant was given leave to file a responding submission by 7 April 2017, but did not do so. I accept the supplementary submissions of the Minister as summarised above.

81 81 *Kumra* also concerned a visa refusal based on PIC 4020 relating to a bogus skills assessment. The appellant was not legally represented. However, he had submitted to the Federal Circuit Court in his judicial review application that the Tribunal:

erred in not giving consideration to the fact that I did not provide a fraudulent document. I provided evidence to that effect. The [Tribunal] disregarded the evidence. According, the [Tribunal] erred as a matter of law.

82 82 Moshinsky J found that it was not clear whether the appellant had provided such evidence to the Tribunal, and if so, how he did so. Moshinsky J stated at [23] that the appellant himself stated that he “did not have any evidence to prove” that he worked at the relevant bakery, for the purposes of the skills assessment, for one and a half years, and despite saying that he had sent the Department a letter concerning his work experience, he did not produce a copy of the letter before this Court or the Federal Circuit Court. Moshinsky J found, at [24], that the proposition that the appellant had provided evidence to the Tribunal that he had not provided a fraudulent document “does not appear to be correct”. The factual findings with respect to the evidence before the Court in that case were key to the outcome.

83 83 More importantly, the appellant in *Kumra* did not make a claim that his visa application was invalid by reason of fraud being perpetrated on him, as an innocent party, by his migration agent or a third party. Indeed, the appellant maintained before the Federal Court that he had worked at the bakery. Such circumstances are far removed from the claims before *Singh* and *Gill*, and in the present case.

84 84 *Trivedi* was recently applied by Kenny J in *Singh v Minister for Immigration and Border Protection* [2017] FCA 475, again a case about a skills assessment found to be false and misleading by the Tribunal, for the purposes of the application of PIC 4020. Again, the appellant in this case appeared in person. As in *Kumra*, the appellant maintained his claim, at least before the Tribunal, that he had genuinely worked at the mechanic shop for the requisite

period of time. Kenny J found (at [72]), applying *Trivedi*, that the skills assessment would be a “bogus document” under PIC 4020 even if the appellant did not know that the reference in question was purposely false. Again, no argument about third party fraud was made, and no evidentiary foundation was laid for it.

85 85 As is clear from a close reading of these decisions, whether a proceeding succeeds on *Singh* and *Gill* grounds, or whether it fails because of the reasoning in *Trivedi*, may well depend on the facts and issues raised, and the arguments run. The two sets of authorities are not inconsistent.

The Minister’s submissions

86 86 In writing, the Minister’s submissions on this appeal were brief. In oral argument, when counsel for the Minister was confronted with questions about the application of the Full Court’s decisions in *Singh* and *Gill*, the principal submissions made by counsel for the Minister can be summarised as follows:

1. 1. The circumstances of the alleged fraud in the current appeal were far removed from the circumstances in *Singh* and *Gill*, because in those cases an Australian registered migration agent was the individual found to have committed the fraud. Here there are no allegations by the first appellant against her Australian migration agent. Implicit in this submission may have been a further contention that the circumstances in the present appeal were different because the appellants’ Australia migration agent had not acted against or without the appellants’ instructions.
2. 2. To allow the appellants’ contentions to succeed would be to “vastly extend” the law in this area, leading to an “absurd situation” where, if an applicant “puts in a false document, whether to the delegate or the Tribunal”, that conduct could invalidate a visa application.
3. 3. The appellants are precluded from succeeding by the Full Court’s decision in *Trivedi*.
4. 4. The bank statements lodged by the first appellant, or on her behalf, were lodged after the visa application form itself was lodged and any fraudulent character of those bank statements could not invalidate the visa application for fraud.

87 87 In our opinion none of those submissions should be accepted.

88 88 While it is true the circumstances of the alleged fraud are different in this appeal from the facts of *Singh* and *Gill*, as the authorities make clear, it is undesirable to prescribe in

advance the scope of judicial review for third party fraud: *SZSXT* at [51(a)] and [51(g)]; reaffirmed in *Gill* at [46].

89 In *SZFDE* at [11], the Court emphasised the constitutional underpinnings of the Court's supervisory jurisdiction in relation to the due administration of the laws of the Commonwealth, of which the *Migration Act* is one.

90 Instances of fraud, or bad faith, by those exercising public power are a different category, not presently relevant. In this appeal, as in *SZSXT*, *Gill* and *Singh*, the Court is concerned with the effect of third party fraud on the processes of decision-makers under the Act, and on the processes of the Act itself.

91 In *SZFDE*, the Court considered the scope and application of the proposition that "fraud unravels everything".

92 At [29] the Court outlined three steps in the application of this proposition:

- (1) (1) Consideration of what is to be "unravelling";
- (2) (2) What amounts to "fraud" in the context of the *Migration Act*; and
- (3) (3) The curial remedy to effect the "unravelling".

93 The Court endorsed the proposition that fraud cannot be protected by a privative clause: see *SZFDE* at [18] and the authorities there referred to. In terms of what is to be unravelled, at [19], the Court referred to an example where perjured third party evidence led to the quashing, on judicial review, of a court's order, where the order had been obtained on the strength of that evidence. At [20], the Court cited an extract from the decision of Lord MacDermott LCJ in *R (Burns) v County Court Judge of Tyrone* [1961] NI 167 at 172 explaining why certiorari could be granted in cases of "third party fraud":

The supervisory jurisdiction of this court is not at large; but the general aim of that jurisdiction is to promote the due administration of justice, and if a distinction is to be drawn between cases where a decision is procured by perjury and cases where a decision is procured by perjury to which one of the parties is privy, it ought to rest on some basis of principle. I am unable to discern any such basis here. Litigation between parties, whether civil or criminal, does not necessarily mean that there are not others anxious or interested to sway the issue one way or the other, and it would, I think, be a grave defect in the procedure of this court if one of these forms of fraud could be noticed but not the other. I can find no rational ground for the sort of discrimination which must prevail if we are to accede to the submission under discussion. If certiorari does not lie in such circumstances there is no other redress and an order undoubtedly founded on perjury remains effective.

94 In *DPP v Moseley* [2013] NTSC 8; 275 FLR 140, the Full Court of the Supreme Court of the Northern Territory found that it had equitable jurisdiction to set aside a judgment of the Court of Criminal Appeal in circumstances where that judgment was actuated by third party fraud (also by way of false evidence). The Full Court (Riley CJ, Kelly and Barr JJ) referred to decisions of other State Supreme Courts stating, at [50], “[t]he potential of fraud to corrupt and bring into disrepute the system of justice administered by the courts has been referred to in strong terms by other courts.” The Full Court concluded at [53]:

The absence of any other remedy for the alleged fraud is a compelling reason for the Supreme Court to utilize the former Chancery remedy to restore the position between the parties to that which existed before the institution of the defendant’s appeal to the Court of Criminal Appeal on the basis of the (now impugned) fresh evidence.

95 Special leave to appeal from this decision was granted, however the appeal was discontinued. The existence of such an equitable jurisdiction in criminal proceedings was doubted by Morrison JA in *R v Stanley* [2014] QCA 116; [2015] 1 Qd R 118 at [63]-[70]. Nevertheless, the unravelling effect of fraud was said by Morrison JA to be catered for in the pardon procedure, in the context of criminal law.

96 The High Court in *SZFDE* also referred (at [24]-[26]) to earlier versions of the substantive judicial review provisions contained in the *Migration Act* where fraud was one of the identified grounds. The Court endorsed decisions of this Court (notably Lindgren J in *Wati v Minister for Immigration and Ethnic Affairs* [1996] FCA 1043; 71 FCR 103 at 112) that a decision under the *Migration Act* could be reviewed if it was affected by the fraud of “some person”.

97 At [27], the High Court observed the case for a supervisory jurisdiction that included third party fraud was strengthened by the fact that the Federal Circuit Court exercised a jurisdiction referable to s 75(v) of the *Constitution*. That feature should, in our respectful opinion, be re-emphasised in the context of the current appeal.

98 Of course in *SZFDE*, the Court was concerned with conduct by a person who falsely claimed to be a migration agent and solicitor and who, wrongly, and against their interests, advised a family of visa applicants not to attend a hearing of their review before the Refugee Review Tribunal. The Court found (at [42] and [47]), endorsing the dissenting reasons of French J in the Full Court, that the person’s conduct had an effect on the decision-making processes of the Tribunal because the Tribunal process, to which a hearing was integral,

miscarried due to the fraudulent advice. The Tribunal was “disabled” from the “due discharge” of its statutory functions with respect to the review: *SZFDE* at [51].

99 99 It is clear that in *SZFDE*, the Court placed no arbitrary or express limits around the kind of circumstances of fraud to which the principles it set out could be applied. It expressly endorsed and applied the proposition that third party fraud could affect the validity of an administrative decision or process.

100 100 Complicity, or even “indifference”, of the visa applicant was not raised as an issue in *SZFDE*. It may be inferred the Court took as its starting point that there was no such behaviour, and that its premise was a fraud perpetrated “on” the visa applicant: see [50].

101 101 The Minister’s first submission should not be accepted. There is no basis to reject the appellants’ contention simply because the factual circumstances of the alleged third party fraud are quite different.

102 102 Similarly we reject the submission there is any “vast extension” of the law. The appellants will be required to prove the fraud (see *SZSJA v Minister for Immigration and Border Protection* [2013] FCAFC 158; 308 ALR 266 at [38] and the authorities there cited), and satisfy the Federal Circuit Court that the first appellant was neither complicit in the fraud nor “indifferent” to it, in the limited and particular sense explained in *Gill and Singh*. That is, as the Chief Justice observed in *SZRUR v Minister for Immigration and Border Protection* [2013] FCAFC 146; 216 FCR 445 at [51], a heavy burden.

103 103 If the appellants establish those matters, the second question for the Federal Circuit Court will be how, if at all, the fraud which is proven to have occurred, affected the processes by which the appellants’ visa applications were to be considered: see *Minister for Immigration and Citizenship v SZLIX* [2008] FCAFC 17; 245 ALR 501 at [33]. That is because, as the High Court said in *SZFDE* and Full Courts of this Court have reiterated, there must also be a fraud “on” the administrative decision-maker, in the sense of the fraud affecting that decision-maker’s statutory functions and obligations, or adversely affecting, disabling or stultifying the processes which the Act prescribes. In *SZFDE* the effect was on the Tribunal’s hearing function. It may well be that an applicant cannot establish this requirement on the facts: see for example *Minister for Immigration and Citizenship v Lu* [2010] FCAFC 147; 189 FCR 525 at [38] and *SZLHP v Minister for Immigration and*

Citizenship [2008] FCAFC 152; 172 FCR 170 at [13]-[18] (Branson J), [27] (Lindgren J), [51] (Graham J).

104 104 The scheme of Pt 2 of the *Migration Act* is premised upon the existence of a valid visa application. Subject to presently irrelevant exceptions, from the submission of a valid visa application flows a statutory obligation to consider it until a decision is made under s 65: s 47(1) and (2). Similarly there is an imperative obligation not to consider a visa application which is not a valid application: s 47(3). These propositions are well-accepted: see *Plaintiff S297/2013 v Minister for Immigration and Border Protection* [2014] HCA 24; 255 CLR 179 at [30]-[32] (Crennan, Bell, Gageler and Keane JJ); *Plaintiff M150/2013 v Minister for Immigration and Border Protection* [2014] HCA 25; 255 CLR 199 at [39]-[40] (French CJ); *Minister for Immigration and Border Protection v Kumar* [2017] HCA 11; 91 ALJR 466 at [2]-[3] (Bell, Keane and Gordon JJ) and [32] (Gageler J).

105 105 As the Full Court in *Singh* stated at [45], there is no clear intention disclosed by ss 46 and 47 of the Act that the validity requirements in s 46 are intended to be exhaustive, and in particular are intended to exclude a visa application affected by third party fraud. The concept of a valid visa application, on the current state of authority of this Court, does not include an application made without the actual or otherwise authority of the named visa applicant, where the visa applicant does not have capacity to give authority (see *Kim*) and does not include an application based on fraudulent documents where the visa applicant is neither complicit in the fraud nor indifferent to the use of unlawful or dishonest means (see *Singh* and *Gill*).

106 106 If this were not the case, the evident intention of the Act that only visa applications made in accordance with law should be considered and determined, would be frustrated and stultified. Whether because of an absence of consent, or capacity (where there is no legal guardianship applicable), or because of third party fraud, such an application for permission to enter and/or remain in Australia (see s 29) is in law no application at all.

107 107 For that reason the Minister's second submission should be rejected. We have rejected the Minister's third submission at [75] above.

108 108 Finally, the Minister's fourth submission conflates the concepts of a visa application form and a visa application. The former is a specific document that initiates the visa application process contemplated by s 45. The latter comprehends not only the form filed, but

supporting documents, statements and any other material (including interviews) which must be “considered” by the Minister (s 47) until a decision is made under s 65.

109 109 Authority for this proposition can be found in the Full Court decision of *Minister for Immigration and Multicultural Affairs v Li* [2000] FCA 1456; 103 FCR 486 at [76] where the Full Court said:

...the legislation uses the term ‘application’ in two senses. Sometimes, as in s 54, the word refers to the application form itself. On other occasions, as in *ss 45 and 46*, it refers to the process of applying for a visa which includes, but is not limited to, the completion of a prescribed application form.

(Emphasis added.)

110 110 Further, s 54(2)(c) of the Act, read with s 55, expressly contemplates that a person may give “additional relevant information” to the Minister or her or his delegates at any time prior to the making of a decision. The terms of s 54(2) provide that such information is to be treated as information “in” an application. This is, as we have noted at [17] above, how the Minister’s delegate approached the matter.

111 111 There is no basis for the suggestion that the only fraudulent conduct which can affect the validity of a visa application is fraud perpetrated on a visa applicant in the application form itself, or in documents which as a matter of timing rather than substance happen to be lodged with the visa application form, rather than a day or a week later.

Conclusion

112 112 Leave should be granted to the appellants to rely on the amended notice of appeal handed up at the hearing of the appeal.

113 113 The appeal should be allowed and the matter should be remitted to the Federal Circuit Court for determination in accordance with this Court’s reasons. Before the Federal Circuit Court, the appellants will bear the onus of proving that the fraud alleged was a fraud perpetrated on the first appellant: that is, that she was neither complicit in it nor “indifferent” to it, in the limited sense explained in *Singh and Gill*. The appellants will also need to prove that the submission of those fraudulent documents provided by the Nepalese agent to their migration agent and then to the Minister’s delegate “stultified” the visa application and determination processes for which the *Migration Act* provides. The Minister will be able to both adduce any evidence he considers appropriate, and to test (whether by way of evidence or by way of cross-examination) the appellants’ case. There is in those circumstances no

relevant prejudice to the Minister. Whether the Federal Circuit Court is satisfied of the matters alleged, and whether the Court considers declaratory relief as sought to be appropriate, will be matters for it.

114 114 We also accept the appellants' submission that given the findings previously made by the Federal Circuit Court in this matter it is appropriate that the matter be remitted to the Federal Circuit Court, differently constituted. The appellants having succeeded, and the Minister having opposed both the grant of leave and the substantive arguments made by the appellants, it is appropriate that the Minister pay the appellants' costs of the appeal. Counsel for the appellants properly conceded that given the new ground raised, it is not appropriate to substitute any orders for costs in favour of the appellants before the Federal Circuit Court. The current costs order in the Federal Circuit Court will be set aside and the parties should bear their own costs before the Federal Circuit Court. Accordingly no additional costs orders are required.

I certify that the preceding one hundred and fourteen (114) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Gilmour and Mortimer.

Associate:

Dated: 15 December 2017

REASONS FOR JUDGMENT

LOGAN J:

115 115 I have had the advantage of reading in draft the reasons for judgment of Gilmour and Mortimer JJ (joint judgment).

116 116 I take a different view as to whether the appellants ought to be granted leave to amend their notice of appeal. In my view, leave to amend should be refused. The appellants having abandoned the specified grounds of appeal, that refusal of leave would have the consequence that their appeal should be dismissed, with costs.

117 117 In *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319, Mason J, with whom Murphy, Aickin, Wilson and Brennan JJ agreed, observed:

In some cases when a question of law is raised for the first time in an ultimate court of appeal, as for example upon the construction of a document, *or upon facts either admitted or proved beyond controversy*, it is expedient in the interests of justice that the question should be argued and decided ...

[Emphasis added]

This same principle applies also to whether an intermediate appellate court should grant leave to an appellant to raise as a ground of appeal an issue of law not raised in the original jurisdiction. The words emphasised in the passage quoted highlight a consideration which usually leads to a refusal of leave, no matter what the attraction of a proposed issue of law may otherwise be. That consideration is whether the issue requires an evidentiary foundation and relevant evidence was not or not sufficiently led in the original jurisdiction.

118 118 The reason for this approach was stated by Gibbs CJ, Wilson, Brennan and Dawson JJ in *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8 in a passage which cited with approval, *inter alios*, the observations earlier made by Mason J in *O'Brien v Komesaroff*. The passage concerned is a little lengthy and certainly not unfamiliar in its application in this Court. That familiarity ought not to diminish its force, even in cases in which its application may, to some, appear harsh. Because it is precisely in point, I set it out below:

To say that an appeal is by way of rehearing does not mean that the issues and the evidence to be considered are at large. It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish. The powers of an appellate court with respect to amendment are ordinarily to be exercised within the general

framework of the issues so determined and not otherwise. In a case where, had the issue been raised in the court below, evidence could have been given which by any possibility could have prevented the point from succeeding, this Court has firmly maintained the principle that the point cannot be taken afterwards: see *Suttor v. Gundowda Pty. Ltd.* (1950) 81 C.L.R. 418, at p. 438; *Bloemen v. The Commonwealth* (1975) 49 A.L.J.R. 219. In *O'Brien v. Komesaroff* (1982) 150 C.L.R. 310 Mason J., in a judgment in which the other members of the Court concurred, said [at p 319] ... [the material part of this passage being set out above]

In our opinion, no distinction is to be drawn in the application of these principles between an intermediate court of appeal and an ultimate court of appeal. Finally, in a recent decision of six justices of this Court. (*University of Wollongong v. Metwally* [No. 2] (1985) 59 A.L.J.R. 481, at p. 483, the Court said:

“It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.”

119 119 Examples of cases in this Court in which a question as to whether leave should be given are cited in the joint judgement. I rather doubt, with respect, whether there is any difference in principle evident in these cases, as opposed just to mere applications in particular circumstances of what is so definitively stated in *O'Brien v Komesaroff* and *Coulton v Holcombe* in the circumstances of a particular case.

120 120 There is a great and important public interest in the finality of litigation which underpins this approach to the exercise of appellate jurisdiction. It is a mistake to conceive that the “interests of justice” do not embrace this public interest, however attractive in the abstract the merits of a proposed new ground of appeal may be.

121 121 That public interest is just as applicable to migration appeals as it is to other cases which arise in the civil jurisdiction. It is just that with migration appeals it is not uncommon to encounter cases which do in the interests of justice call for a grant of leave to permit an issue of law not raised below to be raised for the first time on appeal. Especially that is so in cases involving an asylum seeker appellant who, through no fault of him or her, is ignorant not just of legal principle but also of the English language and whose ability to plead a pertinent jurisdictional error ground before the Federal Circuit Court in the exercise of that court’s original, judicial review jurisdiction is correspondingly limited. Further, the raising of a new ground on appeal will usually occur against the background of an uncontroversial given of material before an administrative tribunal and, in turn, before the Federal Circuit Court. The interests of justice not infrequently dictate in such cases that an appellant have leave to plead a ground of appeal raising an issue not raised below.

122 122 The issue now sought to be agitated is whether the Federal Circuit Court erred by not deciding the jurisdictional fact of whether fraud had invalidated the visa application or the visa application process. The Federal Circuit Court did not deal with this issue because the appellants did not plead this as a ground of review. The appellants were represented by counsel and solicitors before the Federal Circuit Court.

123 123 Materially, what was pleaded (ground 3) by the appellants in the Federal Circuit Court was this ground:

The Second Respondent [the Administrative Appeals Tribunal – “Tribunal”] made jurisdictional error by failing to consider whether fraud by a third party vitiated the visa application process of that fraud had been perpetrated on the Applicant as well as on the First and The Second Respondents.

This ground was resolved against the appellants by an application of this Court’s judgment in *Trivedi v Minister for Immigration and Border Protection* (2014) 220 FCR 169. Applying that case, the learned primary judge held (at [28]) that, any inquiry by the Tribunal as to “whether the fraud involved in the submission by the applicant’s agent of fraudulent bank statements also constituted a fraud against the applicant” ... “would not have been relevant to whether the fraudulent bank statements were “*bogus* documents”” within the meaning of s 97 of the *Migration Act 1958* (Cth). This conclusion was correct for the reason given by the primary judge. The document would remain a “bogus document” as defined, even if the visa applicant were not aware that the information it contained was purposely untrue. The correctness of this conclusion is no longer challenged by the appellants.

124 124 The focus of this pleaded ground of review was on the proceedings in the Tribunal. Consistent with the absence of any pleading that the Federal Circuit Court should determine for itself and as a jurisdictional fact that fraud had vitiated the visa application or the visa application process, the appellants led no evidence in that court, either orally or by affidavit, that the visa applicant and her mother were the innocent victims of a fraud perpetuated by an agent in Nepal.

125 125 No reference was made by the appellants in the Federal Circuit Court to this Court’s decisions in *Gill v Minister for Immigration and Border Protection* (2016) 248 FCR 398 and *Singh v Minister for Immigration and Border Protection* (2016) 247 FCR 554. These decisions were published after the trial in the Federal Circuit Court but prior to the delivery of judgment by that court. There was no application to that court to re-open proceedings so as to seek to raise as an issue a need to determine any jurisdictional fact with leave to adduce

related evidence. Further and in any event, the issue itself was always one which it was open to the appellants to have raised in the original jurisdiction.

126 126 In these circumstances, another observation made by Gibbs CJ, Wilson, Brennan and Dawson JJ in *Coulton v Holcombe* (1986) 162 CLR 1 at 9 is also pertinent:

Of course, the need to gather further evidence which may give rise to further disputation is a matter which bears directly on the justice of the decision to allow the new issue to be litigated at the appellate stage.

See also, more recently, *Park v Brothers* (2005) 85 ALJR 371 (High Court) at [34]:

In adversarial litigation, as a general rule, a party is bound by the conduct of his case. There are circumstances in which the interests of justice may lead an appellate court to permit a party to raise a point that was not taken at trial, but where the point is one that could have been met by calling evidence below then it cannot be raised for the first time of appeal.

127 127 Had the proposed ground of appeal been raised, the Federal Circuit Court would have needed to decide not just whether it was obliged to determine as a jurisdictional fact whether fraud by the agent in Nepal invalidated the visa application or visa application process but also, if it concluded that it was so obliged, whether or not, on the evidence which was led, there was such fraud and whether the visa applicant and her mother were innocent victims thereof. This would have lent a very different focus to the proceedings in that court to the issue raised by the pleaded ground of review.

128 128 Of course there is an interesting public law issue entailed in whether third party fraud on an innocent victim does or does not invalidate the visa application or visa application process. But there would be no end to litigation if litigants were permitted to raise on appeal, and thereby secure a retrial in respect of, an issue which could have been raised and on which related evidence could have been led at trial. As was observed in *University of Wollongong v Metwally (No. 2)* (1985) 59 ALJR 481, at 483, “It is elementary that a party is bound by the conduct of his case.”

129 129 That the Minister will have, on a re-trial, an opportunity to test the evidence which the appellants come to lead and, if so advised and able, to lead his own does not, in my view, bring this case within any recognized exception to that elementary proposition. The time for the Minister to have had that opportunity was at the trial which has already been conducted. As it was, because the appellants chose to conduct their case at that trial in a particular way, no such opportunity arose.

- 130 130 For these reasons, I would uphold the Minister's objection and refuse leave to amend the notice of appeal and dismiss the appeal. The Minister's submission in support of that objection was, it is true, tersely put but it was made by reference to pertinent authority. Prolixity in advocacy, oral or written, improves neither a good nor a bad point.
- 131 131 Related to my view as to the disposition of the appeal, I expressly refrain from passing upon the merits, if any, of the proposed ground of appeal.

I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan.

Associate:

Dated: 15 December 2017